REMARKS/ARGUMENT

The Applicants respond under 37 C.F.R. § 1.111 to the Office Action of November 24, 2009.

Claims 9 through 19 and 21 are pending in the application. Claims 1 through 8, 10, 11, and 20 are canceled, and new claims 22 through 27 are added. No ne fee for claims is due.

A new Terminal Disclaimer accompanies this response. The Official Fee was PAID and charged to the deposit account identified above. No additional fee is due for the Terminal Disclaimer.

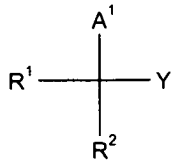
An Information Disclosure Statement accompanies this response. The statement identifies citations from the Assignee's co-pending U.S. Application No. 10/588,532. This co-pending application is the subject of the Terminal Disclaimer. The Information Disclosure Statement authorizes payment of the Official Fee.

The specification is amended to correct errors of a clerical nature. No new matter is added to the specification by these amendments, and their entry is respectfully requested.

Claims 9, 12 through 19, and 21 are rejected under 35 U.S.C. § 103(a) as being unpatentable over WO 2001/11965 (Cooke et al.) in view of WO 2002/069712 (Holah et al.). The Applicants traverse this rejection and request reconsideration.

For convenience, in responding to this Office Action, the Applicants refer to the U.S. equivalents of the two PCT publications: U.S. Patent No. 6,821,992 to Cooke et al. and U.S. Publication No. 2007/0293549 to Holah et al.

Cooke et al. disclose compounds of general formula I,



where A^1, R^1, R^2 and Y are as defined in the description; and to their use as phytopathogenic fungicides.

It has been pointed out in the second paragraph of the present specification that international patent application WO 01/11965 generically discloses numerous pyridylethylbenzamide derivatives and that the possibility of combining one or more of these numerous pyridylethylbenzamide derivatives with known fungicidal products to develop a fungicidal activity is disclosed in general terms, without any specific example or biological data. Applicants do not deny that the broad disclosure of Cooke et al. reads on N-{2-[3-chloro-5-(trifluoromethyl)-2-pyridinyl]ethyl}-2-trifluoromethylbenzamide, but do not believe this compound, per se, is mentioned.

It is submitted that there is no teaching or suggestion in Cooke et al. of the synergistic effect obtained when these pyridylethylbenzamide derivatives are combined with compounds capable of inhibiting the transport of electrons of the respiratory chain in phytopathogenic fungal organisms.

The Examiner has previously acknowledged that Cooke et al. do not specifically teach:

that the weight ratio of compound (a) to compound (b) in the composition is from 0.01 to 20;

that the additional anti-fungal agents to be used inhibit electron transport;

that compound (b) of the composition is capable of inhibiting reduced nicotinamide-adenine dinucleotide dehydrogenase in phytopathogenic fungi;

that compound (b) of the composition, which is capable of inhibiting reduced nicotinamide-adenine dinucleotide dehydrogenase in fungal organisms, is diflumetorim;

that compound (b) is a compound capable of inhibiting succinate dehydrogenase in phytopathogenic fungi;

that compound (b) is any one of the listed compounds in claim 13;

that compound (b) is a compound capable of inhibiting mitochondrial ubiquinol:ferricytochrome-c oxidoreductase in phytopathogenic fungi;

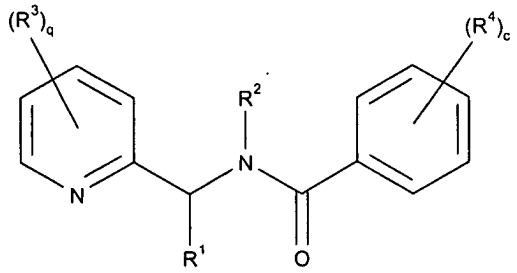
that compound (b) is any one of the listed compounds of claim 15;

that compound (b) is one of the listed strobilurin derivative compounds listed in claim 16; and

that an additional compound (c) is one of the compounds listed in claim 18.

The secondary reference, Holah et al., fails to supplement these deficiencies, as a reference, of Cooke et al.

Holah et al. disclose that a compound of the formula:



where R^1 can be hydrogen. Thus, in one embodiment, the Holah compound can have a $-CH_2-$ group between the pyridine ring and the benzamide moiety. However, the compounds employed in the practice of the present invention have a $-CH_2-CH_2-$ moiety between the pyridine ring and the benzamide moiety. Accordingly, Holah does not teach the use of the compounds employed in the practice of the present invention.

The Applicants acknowledge that compounds of the 2-pyridylethylbenzamide type, which are employed in the compositions of the present invention, have fungicidal action and are disclosed and claimed in U.S. Patent No. 7,572,818. The Applicants also acknowledge that compounds capable of inhibiting succinate dehydrogenase in phytopathogenic fungal organisms and compounds capable of inhibiting mitochondrial ubiquinol:ferricytochrome-c oxidoreductase in phytopathogenic fungal organisms are known in the art and have been used as fungicides. However, it is the Applicants' position that they have discovered a combination that clearly exhibits synergism and is neither disclosed nor suggested by the cited art. They have demonstrated this synergism for this combination in the examples of the specification, using

means for determining synergism that is accepted in the art, i.e., the Colby formula, which was published in the journal 15 WEEDS 20-22 (1967). Unexpected results have been shown for the claimed combination and it logically follows from this that the combination cannot be obvious.

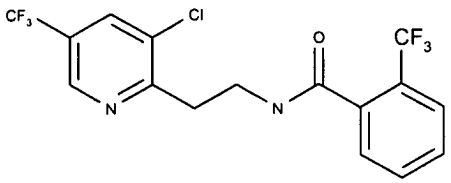
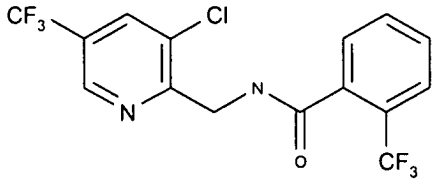
The Examiner has stated:

> The compounds taught by Holah et al., in which the R^1, R^2=H, are homologues of the pyridylethylbenzamide compounds claimed, as they differ by a -CH_2- moiety between the pyridyl ring and the benzamide nitrogen. Compounds which are homologues are expected to have similar chemical and physical properties, absent unexpected results.

The Examiner in the prosecution of U.S. Patent No. 7,572,818, referred to above, made a similar argument:

> The difference between the prior art [i.e., Moloney et al.] compound and the instantly claimed compound is the alkylene group between the pyridyl group and the benzamide moiety. In the instant compound, alkylene group is ethylene. In the prior art compound, alkylene group is a methylene group. The prior art compound and the instant compound are homologues of each other. Homologues are compounds that differ by a methylene linkage. Here, the Moloney compounds are also fungicides as are the instant compounds. See line 4 of page 2.
>
> It would have been obvious to one of ordinary skill in the art to synthesize homologues of this class of compounds and compositions. Accordingly, the compounds are deemed unpatentable therefrom in the absence of a showing of unexpected results for the claimed compounds over those of the generic prior art compounds.

The applicants in that case, in response thereto, submitted the following experimental data to show unexpected results that demonstrate the benefits in terms of fungicidal activity of an *ethylene* group linking the pyridyl and benzamide moiety with each other, rather than a *methylene* group:

Compound		*Botrytis cinerea*	*Alternaria brassicae*
According to the invention of U.S. 7,572,818		Good to very good activity (80-100%) at 330 ppm	Good to very good activity (80-100%) at 330 ppm
Compound 1 of U.S. 6,503,933 (Moloney et al.)		No activity at 330 ppm	No activity at 330 ppm

The applicants in that case argued that this finding would have been surprising to the person of ordinary skill in the art and would not have been rendered obvious by Moloney et al., and submitted a Declaration Under Rule 132 in support of the data.

Similarly, it is submitted that the teaching of Holah et al. is insufficient to supplement the deficiencies of Cooke et al. as a reference against the patentability of the present invention.

Further, to the best of the current Applicants' understanding, the Holah et al. compounds do not fall within the scope of the teaching of Cooke et al., either, since it does not appear that Cooke et al. disclose compounds having a $-CH_2-$ (methylene) group between the pyridine ring and the benzamide moiety. Thus, it is submitted that Holah et al. is not properly combinable with Cooke et al. to render the present invention obvious to those of ordinary skill in the art.

Further, it has been acknowledged by the Examiner in the Office Action that neither Holah et al. nor Cooke et al. teach that the pyridinylbenzamide compound can be combined with an additional compound (b) in a weight ratio from 0.01 to 20.

Accordingly, it is requested that rejection of claims 9, 12 through 19, and 21 under 35 U.S.C. 103(a) as being unpatentable over Cooke et al. in view of Holah et al. be withdrawn.

Claims 9, 12 through 19, and 21 have been provisionally rejected on the ground of non-statutory obviousness-type double patenting as being unpatentable over claims 9 through 17 and 19 of U.S. Patent Application No. 10/588,532 in view of Leroux, 47 PEST. SCI. 191-97 (1996).

As pointed out in the Office Action, a timely filed terminal disclaimer in compliance with 37 C.F.R. § 1.321(c) may be used to overcome an actual or provisional rejection based on a non-statutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. Such a disclaimer was filed by the Applicants on October 26, 2009; however, that disclaimer has not been accepted because, according to the Examiner:

> An attorney or agent , not of record, is not authorized to sign a terminal disclaimer in the capacity as an attorney or agent acting in a representative capacity as provided by 37 C.F.R 1.34(a). See 37 C.F.R. 1.321(b) or (c). The assignee has not established its ownership interest in the application, in order to support the terminal disclaimer. There is no submission in the record establishing the ownership interest by . . . specifying (by reel and frame number) where such documentary evidence is recorded in the Office (37 CFR 3.73(b)).

The assignment of the present application was recorded in the Office on October 10, 2006, on Reel 018437 at Frame 0390.

The present application and U.S. Patent Application No. 10/588,532 are commonly owned by Bayer Cropscience S.A., 16 Jean-Marie Leclair, F-69009 Lyon, France.

A corrected Terminal Disclaimer Under 37 C.F.R. § 1.321(b) and (c) disclaiming, with the customary exceptions, the terminal part of the statutory term of any patent granted on the

instant application that would extend beyond the expiration date(s) of the full statutory term(s) of any patent(s) issued on U.S. Patent Application No. 10/588,532 is filed herewith.

Accordingly, it is requested that the provisional rejection of claims 9, 12 through 19, and 21 on the ground of non-statutory obviousness-type double patenting as being unpatentable over claims 9 through 17 and 19 of U.S. Patent Application No. 10/588,532 in view of Leroux be withdrawn.

In view of the foregoing, it is submitted that this application is in condition for allowance. Favorable consideration is requested.

Respectfully submitted,

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